

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95318
)	
)	
AMANDA N. BAZELL,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE R. MICHAEL WAGNER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Amanda Bazell, was convicted following a jury trial in the Circuit Court of Cass County of burglary in the first degree, Section 569.160, and four counts of stealing, Section 570.030 (two counts of stealing firearms, one count of stealing over \$500, one count of stealing under \$500).¹ The Honorable R. Michael Wagner sentenced appellant to twelve years in prison. The Court of Appeals, Western District reversed one of appellant's convictions for stealing firearms and affirmed the other convictions. This Court transferred this cause on application of respondent; therefore this Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

¹ Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Appellant was charged with two counts of burglary in the first degree and four counts of stealing in the Circuit Court of Cass County, arising out of two incidents on the same day in March 2013 (L.F. 37-42). Two stealing charges were for stealing two different firearms from the same house (L.F. 37-42). One burglary count was mistried and later dismissed (Tr. 539, L.F. 6, 77). Prior to trial, the parties stipulated that there would be no reference to appellant's being in custody while the case was pending, and the prosecutor agreed not to discuss appellant's prior drug use (Tr. 44-47). Evidence at trial was as follows.

Connaughton burglary

Nancy and Phil Connaughton were getting ready for church when they noticed a "shiny" bright blue car drive past their house in the country (Tr. 205-207, 222). They left that morning around five to 9:00; when they got to the main road, they saw the blue car again (Tr. 208-209, 223). It was turning and heading down toward their house, and the Connaughtons assumed the female driver was lost (Tr. 209, 223).

When they returned around noon, they noticed the gate was open (Tr. 210, 224). The front and back doors to the house were also open, and all the lights were on in the back of the house (Tr. 210, 224). In the bedroom, drawers were open and items were thrown around (Tr. 210, 224). The Connaughtons were

missing a jewelry box, a laptop, a telescope, some shoes, and two guns – a Ruger rifle and a Beretta pistol (Tr. 213-218, 224-226).

Stout burglary

Mark and Veronica Stout live on BB Highway in Pleasant Hill (Tr. 250-251). Mark had worked overnight, so he was asleep that morning (Tr. 252). Veronica had gone to church (Tr. 253). Mark was awakened by the doorbell (Tr. 253). He stayed in bed, but it rang again; it was around 10:00 (Tr. 253). Mark went to the window and saw a small blue SUV in his driveway (Tr. 253-255). He saw a young blond female go back to the car from the porch, so he went back to bed (Tr. 256).

Mark heard a creak, and the back door open (Tr. 256). He went to the door of his bedroom and looked out and saw the same person looking through something at the kitchen table (Tr. 257-259). He spoke to her, and she jumped, saying “you scared me” and “is Ashley here?” (Tr. 261). Mark told her she had the wrong house, and asked her for the address of Ashley’s house (Tr. 261). He continued to question her, and she said the information was in her car (Tr. 262-263). She “bolted” out the back door and got in her car, but Mark ducked under the garage door and went to her car (Tr. 263-264). She rolled down the window, and Mark saw she had a male passenger (Tr. 264-265).

They continued their discussion, and at one point showed Mark a pink and black wallet that they said they were dropping off for Ashley (Tr. 265-266). As

the vehicle left, Mark noted the license plate, and then called the police (Tr. 269-270). The officer who responded showed Mark a picture of Nicole Carter on his laptop, and Mark identified her as the girl who had been in his house (Tr. 274-275, 303-304).² After the officer left and his wife returned, Mark realized that his wife's rings were missing from the kitchen window; they were valued at 8,000 dollars (Tr. 277-279).

A few days later, Mark went to the Cass County Justice Center to meet with the detective (Tr. 279). He saw the blue car there, and confronted the driver, who was Nicole Carter (Tr. 281-285). Mark testified that Nicole was not the person that was in his house that day (Tr. 282-283).

Ben Astorga

The blue SUV was located at the home of Ben Astorga, Sr., on BB Highway later that morning (Tr. 304-306, 334-336). Mr. Astorga said he had a son, Ben Jr., who matched Mark Stout's description, and who had been there ten or fifteen minutes earlier with a female named Amanda (Tr. 307, 337-338). He said a silver or gray sedan driven by a Samantha had picked them up (Tr. 309). Officers searched the blue car after obtaining permission from the registered owner, Nicole Carter's grandmother, and it proved to contain paperwork

² He said it looked like her if she had more acne and piercings (Tr. 275). The officer said that Mark identified her "without hesitation" (Tr. 325).

belonging to Nicole Carter, and the black and pink wallet containing credit cards and a social security card belonging to Nicole Carter (Tr. 309-310, 328, 337-339). It also contained some mail addressed to Ben Astorga (Tr. 339). There was no stolen property in the vehicle (Tr. 309, 338).

A gray sedan drove by and slowed down, so officers ran its plate number – since it came back to a Samantha, they stopped the car (Tr. 312-314, 339-340). Samantha Harshner told them that she had picked up her friend Ben and a female named Amanda at the house, and she was returning with the keys to the blue SUV and two large black bags (Tr. 316-319). She told the officers they could have the bags; she did not want them and did not know what was in them (Tr. 318, 340, 342). They proved to contain items from the two burglaries (Tr. 319). A small gun box contained a receipt in the name of Phillip Connaughton; officers also discovered a laptop, telescope and some shoes belonging to the Connaughtons (Tr. 341-343). Samantha was unable to identify anyone in a lineup containing Nicole Carter (Tr. 345-347, 418-425).

Ben Astorga Sr. testified that his son came by that day in March and left a blue SUV at his house (Tr. 352-353). A girl with him was introduced as Amanda; they were there about an hour, then left in a silver car (Tr. 354).

Samantha Harshner testified that she had been friends with Ben Jr. since high school (Tr. 357-358). She was home in bed that morning, when Ben called her to pick him up from his father's house in Pleasant Hill (Tr. 359). She drove there in her gray Impala; she saw a blue car parked there (Tr. 359-360). Ben and a

woman in her late twenties began bringing bags to the car and put them in the back seat (Tr. 361-362). Ben called the woman Amanda (Tr. 363). They got in Samantha's car and she drove them to a location in Independence (Tr. 363-365). On the way, the two were talking about "robbing" a house and looking up prices to see how much they would get for selling a Beretta (Tr. 364-365). They took most of the bags, but left two in the car, and told Samantha to take the key back to the blue car at Ben's father's house (Tr. 366).

Ben Astorga Jr. testified that he was incarcerated for the events occurring March 10, 2013 (Tr. 372). He pleaded guilty and received a six-year sentence for testifying against Amanda (Tr. 373-377). He also received a deal regarding Johnson County charges (Tr. 401, 409). According to Ben, he was at a friend's house that day with Amanda Bazell and Nicole Carter (Tr. 377). He had used heroin and methamphetamine the night before (Tr. 380).

Ben testified that he, Amanda and Nicole left the house about 5:00 a.m. to take Nicole in her blue Kia Sportage to a storage unit (Tr. 380-381). Ben was driving, but he became ill and got in the back seat, so Amanda began to drive (Tr. 381). They dropped Nicole off at the storage units (Tr. 382).

Amanda was going to go to the gas station, but they pulled into a driveway instead (Tr. 382-383). Ben testified that he was awakened by Amanda throwing things on him in the back seat (Tr. 383). He crawled into the front seat, and

Amanda said, “we got to go, I hit a lick” (Tr. 383-384).³ According to Ben, he fell back asleep; he had asked Amanda to drive him to his father’s house (Tr. 384). They stopped at a gas station in Pleasant Hill and got gas and drinks, and Ben opened one of the bags – he found a handgun and a rifle and a couple of jewelry boxes (Tr. 385).

Then Amanda drove into a different driveway, saying she needed to stop at a friend’s house (Tr. 386). When she came back out, a man followed her (Tr. 387). They made excuses to him about why we were there, and then left when he went back inside (Tr. 387-389). On the way to his father’s house, Ben called Samantha for a ride (Tr. 389-390). When she arrived, they had her take them to Independence (Tr. 391-392). Amanda hit Ben in the car for using her name (Tr. 393). When they stopped they parted ways (Tr. 393). Ben testified that he was “on the run” for about three months after that (Tr. 395).

Detective Catron from the Cass County Sheriff’s Department testified that Samantha chose Amanda’s photo from a lineup (Tr. 439-448). He testified that he put the lineup together “from jail photos” (Tr. 439-442). Defense counsel requested a mistrial, which was overruled (Tr. 443-446). Then the detective testified that the photos were “pulled from DOR records” (Tr. 446).

³ “Hit a lick” means to steal something (Tr. 395).

Amanda mailed Ben items of discovery while he was in the Cass County jail with a letter saying she did not say anything about it, and “just put it all off on Nicole” (Tr. 463-464, Exs. 26-29).

The jury returned verdicts of guilty on Counts II through VI (Tr. 539, L.F. 62-66). On November 25, 2013, the Honorable R. Michael Wagner sentenced appellant to a total of twelve years imprisonment (Tr. 542, 555, L.F. 73-74). Notice of appeal was filed December 3, 2013 (L.F. 78).

The Court of Appeals, Western District, issued its opinion as modified on September 29, 2015. *State v. Bazell*, 471 S.W.3d 359 (Mo. App., W.D. 2015). This Court ordered the cause transferred on December 22, 2015.

POINTS RELIED ON

I.

The trial court plainly erred in accepting the jury's verdicts for two counts of stealing a firearm and in sentencing Amanda for both those counts instead of just one count, because this violated Amanda's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, in that stealing two firearms in the course of one burglary only constitutes a single offense because Section 570.030.3 lists the unit of prosecution as "any firearms," Section 570.030.6 indicates that cumulative punishments were intended by the legislature for "the theft of an item of property pursuant to subsection 3 of this section which exceeds five hundred dollars," implying that the individual items for which value is not an issue are not individual units of prosecution; and, under the rule of lenity this Court must adopt the construction that operates in favor of Amanda.

State v. Liberty, 370 S.W.3d 537 (Mo. banc 2012);

State v. Baker, 850 S.W.2d 944 (Mo. App., E.D. 1993);

Bell v. United States, 349 U.S. 81 (1955);

Benton v. Maryland, 395 U.S. 784 (1969);

U.S. Const., Amends. V and XIV;
Sections 217.360 and 570.030; and
Rules 29.15 and 30.20.

II.

The trial court abused its discretion in overruling defense counsel's request for mistrial when the detective said he compiled the photo lineup from jail photos, because this evidence violated Amanda's rights to due process, a fair trial, and to be tried only for the offense charged, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that telling the jury that Amanda had been in jail destroyed the presumption of innocence to which she was entitled.

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

Deck v. Missouri, 544 U.S. 622 (2005);

State v. Shepard, 654 S.W.2d 97 (Mo. App., W.D. 1983);

U.S. Const., Amends. VI and XIV; and

Mo. Const., Art. I, Secs. 10, 17 and 18(a).

ARGUMENT

I.

The trial court plainly erred in accepting the jury’s verdicts for two counts of stealing a firearm and in sentencing Amanda for both those counts instead of just one count, because this violated Amanda’s right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, in that stealing two firearms in the course of one burglary only constitutes a single offense because Section 570.030.3 lists the unit of prosecution as “any firearms,” Section 570.030.6 indicates that cumulative punishments were intended by the legislature for “the theft of an item of property pursuant to subsection 3 of this section which exceeds five hundred dollars,” implying that the individual items for which value is not an issue are not individual units of prosecution; and, under the rule of lenity this Court must adopt the construction that operates in favor of Amanda.

Amanda was charged with two counts of burglary in the first degree and four counts of stealing in the Circuit Court of Cass County, arising out of two incidents on the same day in March 2013 (L.F. 37-42). Two stealing charges were for stealing two different firearms from the same house (L.F. 37-42). Her right to be free from double jeopardy was violated when she was convicted of two counts

of stealing firearms when she should have only been convicted, at most, of one count.

Standard of Review

The determination of whether the protections against double jeopardy apply is a question of law which this court reviews *de novo*. ***State v. Mullenix***, 73 S.W.3d 32, 34 (Mo. App., W.D. 2002). But because the issue was not raised at the trial court level, Amanda is forced to request review for plain error. ***Rule 30.20***. As this Court has held, because the right to be free from double jeopardy is a constitutional right that goes to the very power of the State to bring the defendant into court to answer the charge brought against her, a double jeopardy allegation determinable from the face of the record is entitled to plain error review on appeal. ***State v. Liberty***, 370 S.W.3d 537, 546 (Mo. banc 2012).

Multiple convictions for simultaneous theft of firearms is prohibited

The Fifth Amendment provides that no one shall be subject for the same offense to be twice put in jeopardy of life or limb. ***State v. White***, 14 S.W.3d 121, 125 (Mo. App., W.D. 2000). The Fifth Amendment is incorporated in and made applicable to the states by the Fourteenth Amendment. ***White***, 14 S.W.3d 121; ***Benton v. Maryland***, 395 U.S. 784 (1969).

The federal double jeopardy clause protects defendants not only from successive prosecutions for the same offense after either an acquittal or a

conviction, but also from multiple punishments for the same offense. *Liberty*, 370 S.W.3d at 546. When a defendant’s conduct is continuous or involves more than one item, the test is focused on the conduct the legislature intended to proscribe under the statute. *Id.* Double jeopardy analysis regarding multiple punishments is limited to determining whether cumulative punishments were intended by the legislature. *Id.* at 546-547.

To determine whether the legislature intended multiple punishments, a court looks first to the “unit of prosecution” allowed by the statute under which the defendant was charged. *Liberty*, 370 S.W.3d at 547. If a charging statute does not express unambiguously the permissible “unit of prosecution,” the rule of lenity resolves doubts about the intended unit in favor of the defendant and dictates that a single criminal transaction should not result in charges for multiple offenses. *Id.*, citing *Bell v. United States*, 349 U.S. 81 (1955) (transportation of two women on the same trip and in the same vehicle in violation of the Mann Act constituted a single offense; “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.”).

Section 570.030. provides that a person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion. Under subsection 3, any offense in which the value of property or services is an element is a class C felony if the property appropriated consists of “Any

firearms[.]” Section 570.030.3(3)(d). The question presented in this appeal is whether the alleged simultaneous theft by Amanda of two firearms is one or two violations of this statute in light of the “any firearms” language used in the statute.

In *State v. Baker*, 850 S.W.2d 944 (Mo. App., E.D. 1993), the defendant was convicted of four counts of possession of a weapon on the premises of a correctional facility, Section 217.360, RSMo 1986. *Baker*, 850 S.W.2d at 946. These charges resulted from a search of the defendant’s prison cell, which turned up four homemade weapons. *Id.* Section 217.360.1(4) prohibited the possession in or about the premises of any correctional facility “any . . . weapon.”

A 29.15 postconviction motion was filed alleging ineffective assistance of counsel for failing to raise an issue that the defendant’s conviction for four violations of the statute rather than one violation of the statute violated the defendant’s right to be free from double jeopardy. *Id.* at 947. The defendant was denied an evidentiary hearing. *Id.*

In determining whether an evidentiary hearing was necessary, the Court of Appeals first had to determine whether or not there was a valid double jeopardy claim. *Id.* In reaching its conclusion that there was a valid double jeopardy claim, the Court first noted that cases from a number of jurisdictions had determined that the term “any” in statutes was ambiguous as to the allowable unit of prosecution; this ambiguity precluded multiple convictions and punishments. *Id.* at 947-948. Because the weapons statutes use of the word “any” was ambiguous as to the

allowable unit of prosecution, the defendant was prejudiced by defense counsel's failure to raise the doubles jeopardy issue at trial. *Id.*⁴

In *Liberty*, 370 S.W.3d at 548, this Court held that the proscription against possession of “any obscene material” was ambiguous, for it reasonably could be interpreted to permit either a single prosecution or multiple prosecutions for a single incidence of possession of eight still photographs of child pornography, and under the rule of lenity, the statute had to be interpreted in the defendant's favor. Here, the use of “any” is even clearer – because the statute reads not only “any firearm” but “any *firearms*” (plural).

That stealing “any firearms” is a single unit of prosecution is made even clearer by subsection 6 of the statute. That subsection says that “The theft of any item of property or services pursuant to subsection 3 of this section which exceeds five hundred dollars may be considered a separate felony and may be charged in separate counts.” Section 570.030.6. Since no value was alleged as to the firearms at issue, their theft is not governed by this subsection. And the exclusion of firearms from this subsection implies that the legislature did not intend the separate items listed in subsection 3 (i.e., firearms, flags, live fish) to be separate units of prosecution. *See, State v. Jones*, 172 S.W.3d 448, 456 (Mo. App., W.D. 2005) (Statutes defining crimes will not be interpreted as embracing any but those

⁴ This Court cited *Baker* with approval on the issue of double jeopardy when the statute uses the term “any” in *Liberty*, 370 S.W.3d at 551-552.

acts or omissions clearly described in the statute both within the letter and spirit of the law, *citing State v. Fredrickson*, 689 S.W.2d 58, 61 (Mo. App., E.D. 1984)).

In *State v. Ross*, ___ S.W.3d ___, 2015 WL 2090252 (Mo. App., S.D. 2015), the Court of Appeals, Southern District, addressed a similar question, but reached the opposite result from that of the Western District in this case. The Southern District decided that *State v. Heslop*, 842 S.W.2d 72 (Mo. banc 1992), controlled wherein this Court negated the “single larceny rule.” *Ross*, slip. op. at 3, *citing, Heslop*, 842 S.W.2d at 75. But *Ross* was wrongly decided – *Heslop* is inapposite.

First, the issue in *Heslop* was whether stealing two motor vehicles at the same time constituted double jeopardy, not whether the language of the statute proscribed a larger unit of prosecution. In *Heslop*, this Court found that each act of stealing a motor vehicle in that case entailed an episode of dissimilar conduct, and that each act constituted a separate and distinct stealing. *Heslop*, 842 S.W.2d at 76. Here, two guns were taken from the same house at the same time in the same burglary, but separated by the state into two separate charges.

Second, as noted in the Western District’s *Bazell* opinion, subsection 6 of 570.030 was not included in the statute when *Heslop* was decided. *Bazell*, 471 S.W.3d at 367, n.2. Read as a whole, Section 570.030 shows a legislative intent not to allow multiple punishments for a single incidence of theft of multiple firearms not valued over \$500. Subsection 6, which makes a separate unit of prosecution for items valued over \$500, makes that clear. If the legislature wanted

to make other subsections separate units of prosecution, it had every opportunity to do so.

As in *Baker* and these other cases, the use of the phrase “any firearms” is at least ambiguous (or even clear in Amanda’s favor) to the allowable unit of prosecution and that ambiguity must be resolved against turning a single transaction into multiple offenses. *Bell, supra*. And if this Court finds it is not clear that multiple convictions for the simultaneous theft of multiple firearms *was* intended by the Missouri legislature, the ambiguity must be resolved in Amanda’s favor. This Court must reverse one of Amanda’s stealing convictions (Counts 3 or 4) and order her discharged from that sentence.

II.

The trial court abused its discretion in overruling defense counsel's request for mistrial when the detective said he compiled the photo lineup from jail photos, because this evidence violated Amanda's rights to due process, a fair trial, and to be tried only for the offense charged, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that telling the jury that Amanda had been in jail destroyed the presumption of innocence to which she was entitled.

Standard of review

The standard of review for a trial court's refusal to grant a mistrial is abuse of discretion. *State v. Johnson*, 968 S.W.2d 123, 134 (Mo. banc 1998). "The decision whether to declare a mistrial rests largely within the discretion of the trial court because the trial court has observed the incident that precipitated the request for a mistrial and is in a better position than is the appellate court to determine what prejudicial effect, if any, the incident had on the jury." *State v. Schneider*, 736 S.W.2d 392, 401 (Mo. banc 1987). Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Albanese*, 9 S.W.3d 39, 51 (Mo. App., W.D. 1999). Granting a mistrial is a drastic remedy and should be exercised only

in extraordinary circumstances where the prejudice to the defendant cannot be removed any other way. *Id.*

Detective Catron from the Cass County Sheriff's Department testified that Samantha chose Amanda's photo from a lineup (Tr. 439-448). He testified that he put the lineup together "from jail photos" (Tr. 439-442). Defense counsel requested a mistrial, which was overruled (Tr. 443-446). Then the detective testified that the photos were "pulled from DOR records" (Tr. 446).

Analysis

As a general rule, evidence of other crimes is inadmissible if it is offered to show that a defendant is a person of bad character, or has a propensity to commit crimes. *State v. Conley*, 873 S.W.2d 233, 236 (Mo. banc 1994). Evidence of other crimes should be utilized only when there is strict necessity. *State v. Helm*, 892 S.W.2d 743, 745 (Mo. App., E.D. 1994). Trial courts should be wary of evidence concerning other crimes because the admission of this kind of proof "tends to run counter to the rule that forecloses using an accused's character as the basis for inferring guilt." *State v. Dudley*, 912 S.W.2d 525, 528 (Mo. App., W.D. 1995). The admission of other crimes evidence which is "not properly related to the cause on trial violates the defendant's right to be tried for the offense with which he is charged by the information. Sec. 18(a), Art. I, V.A.M.S. Const. of Missouri 1945." *State v. Dunn*, 309 S.W.2d 643, 645 (Mo. banc 1958).

Evidence of other crimes must be both logically and legally relevant to be admissible. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). Logical relevance means that the proffered evidence tends to directly establish a defendant's guilt. *Id.* For evidence to be considered legally relevant its prejudicial effect must be outweighed by its probative value. *Id.* While a defendant's propensity to commit a crime may be logically relevant, it is not legally relevant because the prejudicial effect of such evidence outweighs its probative value. *Dudley*, 912 S.W.2d at 528. The probative value of other crimes evidence increases when it can be shown that the evidence is offered to prove an issue other than propensity or bad character. *Id.* There was no probative value to the information that “jail photos” were used to compile the photo lineup in which Amanda’s picture appeared.

With *no* probative value at issue, telling the jury that Amanda had been in jail before is akin to having her appear unnecessarily in shackles before the jury, in that it violates the presumption of innocence. The United States Supreme Court in *Deck v. Missouri*, 544 U.S. 622 (2005), stated that “The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a defendant only in the presence of a special need.” *Deck*, 544 U.S. at 626. The Fifth and Fourteenth Amendments prohibit the use of visible physical restraints absent a trial court determination in the exercise of its discretion that they are justified by a state interest specific to a particular trial. *Id.*, 544 U.S. at 629. Due process does not permit the use of visible restraints if the trial court has not taken

account of the circumstances of the particular case. *Id.*, 544 U.S. at 632.

Shackling is to be avoided because it undermines the presumption of innocence and the related fairness of the fact-finding process. *Id.*, 544 U.S. at 630-31.

The error was not corrected when Detective Catron testified that the lineup photos were in fact compiled from “DOR records” (Tr. 446). The jury had heard “jail photos” and that bell could not be unrung. *State v. Shepard*, 654 S.W.2d 97, 101 (Mo. App., W.D. 1983). “If you throw a skunk into the jury box, you can’t instruct the jury not to smell it.” *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir., 1962). The denial of the mistrial request violated Amanda’s right to be tried only for the crime with which she was charged and the presumption of innocence. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998); Mo. Const., Art. I, Secs. 17 and 18(a). Therefore, this Court should reverse her convictions and remand for a new and fair trial.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse either Count III or IV outright, and reverse and remand the other counts for a new and fair trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,157 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 7th day of January, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Richard Starnes, Assistant Attorney General, at Richard.Starnes@ago.mo.gov.

/s/ Ellen H. Flottman

Ellen H. Flottman